Supreme Court, U.S.
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NO. 92-1811

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

GREGORY MCCULLOM, et al.

Petitioners,

vs.

BOARD OF EDUCATION OF THE PRINCETON CITY SCHOOL DISTRICT, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

TIMOTHY M. BURKE
(Counsel of Record)
ANDREW S. LIPTON
Manley, Burke, Fischer
& Lipton
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorneys for Petitioners

QUESTION PRESENTED

When will a public school district and its officials be deemed to be deliberately indifferent to the sexual abuse of students by an employee?

LIST OF PARTIES

Gregory McCullom; Robert McCullom, by his parent and natural guardian Gregory McCullom; Adolphus McCullom; Jerry L. and Vickie L. Vermillion; Kimberly June Vermillion, by her parents and natural guardians Jerry L. and Vickie L. Vermillion; Lana Turner; Monroe Turner, by his parent and natural guardian Lana Turner; Jermel Wiley, by his parent and natural guardian Lana Turner; Anna Givens; Donnel Toran Givens, by his parent and natural guardian Anna Givens; Lucian and Sharon Smith; Keith Smith, by his parents and natural guardians Lucian and Sharon Smith; Gary and Connie Zinsmeister; Sonya Zinsmeister, by her parents and natural guardians Gary and Connie Zinsmeister; Maxwell Zinsmeister, by his parents and natural

guardians Gary and Connie Zinsmeister; Louis H. and Archinella Patton, Jr.; Louis H. Patton, III, by his parents and natural guardians Louis and Archinella Patton; Constance and Ronald Klingelhoffer; and Kristen Klingelhoffer, by her parents and natural guardians Constance and Ronald Klingelhoffer, Petitioners and Board of Education of The Princeton City School District, Richard A. Denoyer, David D. Baker, and Bobby R. Cox, Respondents.

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Lana Turner; Monroe Turner, by his parent and natural guardian Lana Turner; Jermel Wiley, by his parent and natural guardian Lana Turner; Anna Givens; Donnel Toran Givens, by his parent and natural guardian Anna Givens; Lucian and Sharon Smith; Keith Smith, by his parents and natural guardians Lucian and Sharon Smith; Gary and Connie Zinsmeister; Sonya Zinsmeister, by her parents and natural guardians Gary and Connie Zinsmeister; Maxwell Zinsmeister, by his parents and natural guardians Gary and Connie Zinsmeister; Louis H. and Archinella Patton, Jr.; Louis H. Patton, III, by his parents and natural guardians Louis and Archinella Patton; Constance and Ronald Klingelhoffer; and Kristen Klingelhoffer, by her parents and

natural guardians Constance and Ronald Klingelhoffer, all plaintiffs in the action below, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

This case was initiated by the filing in state court on May 3, 1988, of a complaint seeking relief under 42 U.S.C. Section 1983, and various state law claims against the Princeton School District, and Jay Clow, one of its school teachers. (T.D. 1.) The complaint was amended three times; on March 6, 1990, Richard Denoyer (District Superintendent), David Baker (Assistant Superintendent) and Bobbie Cox (Evendale Elementary School Principal) were added as defendants. The other amendments brought in

additional petitioner children and their parents. The essence of petitioners' claims was a demand for damages for injuries suffered when eleven of the petitioner children, most of whom were multi-handicapped, were sexually abused by Evendale Elementary school teacher Jay Clow. (T.D. 1, 24, 106, 122.)

On May 24, 1991, the trial court granted summary judgment in favor of the Princeton School District, Richard Denoyer, David Baker and Bobbie Cox. (Appendix C.) The First District Court of Appeals, Hamilton County, Ohio, affirmed the trial court's decision. (Appendix B.) By entry dated February 10, 1993, and on a 4 to 3 vote, the Supreme Court of Ohio overruled petitioners' motion for an order directing the Court of Appeals to certify its records. (Appendix A.)

JURISDICTION

The Supreme Court of Ohio's Entry was dated February 10, 1993. That Entry is reproduced in Appendix A. This petition is filed within 90 days of February 10, 1993. The jurisdiction of this Court is founded upon 28 U.S.C Section 1257(A).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. Section 1983. The pertinent language of these provisions is reproduced in Appendix D.

STATEMENT OF THE CASE

Jay Clow is a pedophile; he sexually, physically and mentally abused children, including his multi-handicapped students. Respondent School District and its officials knew, or with just a minimal amount of supervision should and would have known, that fact. Only their deliberate indifference prevented respondents from protecting his victims.

Petitioners in this action include eleven children and their parents; eight families whose lives have been torn apart as a result of the sexual assault and other abuses perpetrated against the children by respondent's employee. Jay Clow taught multi-handicapped children at the Evendale Elementary School in the

Princeton Public School District for six years. He is now in prison following his guilty plea to multiple counts of sexual misconduct, including several counts involving two of the petitioners here. Seven of the eleven petitioner children were multi-handicapped pupils of Jay Clow.

There is little doubt about Clow's sexual misconduct. He videotaped children in a state of nudity and various stages of changing clothes. This took place in the classroom and school district locker rooms. He fondled children, again in the classroom (in a screened-off, "time-out" area) and in bathrooms. He sodomized at least one of the multi-handicapped petitioners in the school bathroom. Clow also took children to his home (a fact known by

Clow's teaching aide and other School District employees, but allegedly not discovered by respondents or even inquired into) and videotaped, fondled and sodomized them there. Respondents' own expert has confirmed much of this abuse.

Respondents claim no knowledge of their employee's sexual misconduct in the classroom, bathrooms or locker rooms of Evendale Elementary School and elsewhere in the School District. However, in late 1986 or early 1987, the School District Superintendent was told by a local police chief that there was a report that Clow had "supposedly molested" a child. The Superintendent asked for a criminal background check (which turned up negative) and then merely told the principal to "be aware." The school

official supervising and evaluating Clow was also told to look for anything unusual. (She was not told of the report of sexual molestation or what to look for. Instead, she was told "to do nothing, do not talk about this, simply watch the classroom to see if there is anything unusual.") (The School District's own psychologist has indicated that this was inadequate guidance to look for sexual misconduct.)

That summer, the respondent School Superintendent saw Clow enter the elementary school with a young boy. This raised the superintendent's suspicions and caused him to seek a meeting with the parent of the child Clow had allegedly molested. A lieutenant in another area police department arranged for that meeting,

establishing the ground rules demanded by the parent: that she and her child's name be kept confidential, that she would not subject herself or her son to public proceedings, and that the School District would proceed based upon her anonymous report. The Superintendent agreed to these terms. At the meeting, notes taken by one of the respondents indicate that the mother said Clow "sat on bed next to [the boy] ... Jay touched him ... put hand down back of pants ...." In deposition, respondents sought to characterize the information as ambiguous; that the mother was uncertain about what occurred. (However, the lieutenant who set up the meeting indicated that there was nothing ambiguous about the meeting. In addition, the notes (though not

respondent's deposition testimony), conform to a report given by a police officer who interviewed this woman prior to the meeting with respondents.

School District policy provides for involving the District social worker, the in-house expert on child sexual abuse, where there is just such a report as that received by respondents. This was not done here. The in-house expert later testified (learning about the incident for the first time in the course of the deposition) that he would have called the County Department of Human Services (as required by state statute and the published School District policy). Had the agency been called, alarm bells would have gone off: Clow had previously been charged with sexually molesting a child at a county

shelter. (In fact, School District records show Clow had been granted time off from his teaching duties for the days he was in court defending himself against this earlier molestation charge. The School District never discovered why he was off because respondents failed to enforce the School District requirement that the purpose for time off be provided.)

What did respondents do with the information of Clow's sexual molestation of a child? They did not restrict Clow's access to children in the after-school day care program. He was able to take one of the little boys, a petitioner herein, out of the day care program and back to his classroom. There, he videotaped the boy in a state of nudity. Nor did

respondents limit the time Clow was left alone with children in his classroom. While the respondent principal says he told the class aide not to leave Clow alone, Clow's aide categorically denies this and indicates that Clow was frequently alone with children, both in the classroom and when taking them to the bathroom.

The principal claims that in order to watch Clow, he walked past the classroom more often than he had in the past. The aide, however, did not notice that. In any event, a moveable chalkboard kept by the door and used as a partition would have blocked his view, and the time-out area where much of the abuse occurred was separately screened off. Furthermore, the most aggressive step

taken by the District to determine if Clow was taking children home, was that the principal would stand at the front of the building when the children were leaving at the end of the day. If Clow happened to drive past at that time, the principal would look to see if a child was in the vehicle.

In the Spring of 1988, Clow's teaching contract was mysteriously and inexplicably not renewed. Later, in April of 1988, Clow was spotted fondling one of the petitioner children off school grounds. A warrant for his arrest was issued, but respondents made special arrangements with the police to have Clow arrested off school grounds.

ARGUMENT

I. WHEN WILL A PUBLIC SCHOOL DISTRICT AND ITS OFFICIALS BE DEEMED TO BE DELIBERATELY INDIFFERENT TO THE SEXUAL ABUSE OF STUDENTS BY AN EMPLOYEE?

The trial court granted respondents' motion for summary judgment finding that they, as a matter of law, were not deliberately indifferent to the constitutional right of the petitioner children to be safe from sexual molestation by a public school teacher. (Appendix C.) The Court of Appeals affirmed and the Ohio Supreme Court, on a closely divided 4 to 3 vote, refused to certify the record for review. (Appendix A, Appendix B.)

While the trial court simply issued a brief letter opinion, the Court of Appeals issued a more

complete decision. Both courts recognized that the children had a constitutional right not to be sexually assaulted by a public school teacher. (Appendix B at 11a-12a; Appendix C.) The courts, however, indicated that there could be liability under Section 1983 only where respondents had adequate notice that Clow had sexually abused children and where the response was so wanting as to constitute deliberate indifference or reckless disregard for the constitutional rights of the children. (Appendix B at 15a-16a; Appendix C.)

Citing Jane Doe "A" v. St. Louis, 901 F.2d 642 (8th Cir. 1989), the Court of Appeals held that respondents could be liable under Section 1983 only where they had "received notice

of a pattern of continuing widespread, persistent, unconstitutional misconduct" and where there was "deliberate indifference to or tacit authorization of such conduct by the officials after notice to the officials of that misconduct." (Appendix B at 13a.) And, while the Court of Appeals referenced the decision of E.J. v. Hamilton County, 707 F.Supp 314 (S.D. Ohio 1989), where the court recognized that Section 1983 liability may arise from a single incident of abuse that is so outrageous as to create an inference of inadequate supervision, the court failed to apply that standard to the evidence sub judice. (Appendix B at 14a.)

The Court of Appeals then considered the evidence of notice to

respondents of Clow's misconduct (which the court inexplicitly characterized as "undisputed facts" in spite of the substantially conflicting testimony) and concluded that the notice of illegal sexual contact by Clow was "unclear." (Appendix B at 20a.)

While petitioners believe that there were more than adequate indications of sexual misconduct by Clow to put respondents on notice, and to require a significant and meaningful response that would protect the children here, petitioners do not believe that this Court need weigh the evidence on that issue to determine if summary judgment for respondents was proper. Rather, petitioners contend that the lower courts unnecessarily believed they were shackled by a test that looks for respondents' actual

awareness of an employee's misconduct. The courts below failed to heed this Court's lessons in Canton v. Harris, 489 U.S. 378 (1989).

Petitioners believe that the courts below did not try to determine whether the need for more or different supervision is necessary in light of the duties assigned to school teachers, particularly where they have virtually unfettered access to young children. In fact, most of the Circuit Courts of Appeals, in applying the deliberate indifference standard to claims of inadequate supervision, likewise focus upon this subjective test looking to see what defendants knew about the perpetrators of child abuse. See, e.g., Jane Doe v. Taylor Independent School District, 975 F.2d

137 (5th Cir. 1992), cert. denied sub nom. Caplinger v. Doe, ___ U.S. ___, 113 S.Ct. 1066 (1993); Jane Doe "A" v. St. Louis, 901 F.2d 642 (8th Cir. 1989); Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), cert. denied sub nom. Smith v. Stoneking, 493 U.S. 1044 (1990); Thelma D. v. St. Louis, 737 F.Supp. 541 (E.D. Mo. 1990), aff'd, 934 F.2d 929 (8th Cir. 1991).

In Canton v. Harris this Court addressed the issue of when a municipality may be liable under 42 U.S.C. Section 1983 for constitutional violations allegedly caused by a failure to train employees. While Canton v. Harris is essentially an official policy case determining when liability attaches to municipalities,

its lessons are relevant here to determine the liability of respondents.

In Canton v. Harris, this Court stated that:

> It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390. As an example, this Court noted that city policymakers would know to a "moral certainty" that police officers may have to arrest fleeing felons. Thus, given this likelihood, there was a need to train officers in the use of deadly force. Canton, 489 U.S. at 390 n. 10.

Clearly, this is an objective test: is the need for training obviously necessary given situations that officials know will arise in their employees' performance of their duties. The same ought to be true about the need to train, supervise, monitor and investigate public school teachers. Allegations of sexual molestation of children are not so rare or so unusual as to come as a surprise or not require ongoing efforts to monitor teachers' activities. In fact, the school district here had sufficient awareness of such problems to adopt a written policy for addressing allegations of sexual abuse. (While respondents knew enough to have a written policy, when it came time to implement that policy in response to the Clow report, and where following the policy would have provided the critical link in

identifying Clow's proclivities, respondents ignored the policy.)

The specific notice requirement imposed by the courts below, and throughout the circuits, is cruelly callous to the safety of children. How many victims must there be before active supervision becomes necessary to comply with the duty to protect these children? Certainly the risk and severity of resulting harm to public school children is sufficiently great to warrant an active duty to train and supervise school personnel without requiring specific notice that a particular teacher is sexually molesting his students.

A second problem with the lower courts' treatment of the deliberate indifference standard relates to the apparent belief that any supervision, however inadequate, would defeat a Section 1983 claim as a matter of

law. In affirming the trial court's grant of summary judgment for respondents, the Court of Appeals held that respondents' efforts to investigate and monitor Clow were not recklessly or deliberately indifferent as a matter of law. The Court of Appeals noted that respondents had requested a criminal background check; made a determination that there was no statutory duty to contact the County Human Services Department; and were looking for unusual behavior in the classroom. The court also noted that the principal walked by the classroom more frequently and relieved Clow's aide of duties which might have taken her out of the classroom. (The court ignored the aide's categorical denial that this ever occurred and the fact that even if Cox had walked by the room he could not see most of the room

because of partitions Clow had in place.) In addition, the court considered other evidence of misconduct by Clow (such as reaching into the back of a boy's pants to mark his underwear to determine if it was the source of an odor, later determined to have resulted from Clow sodomizing the boy) to simply be "unusual methods in meeting the challenges of educating mentally deficient children." (Appendix B.)

More importantly, the Court of Appeals affirmed the trial court's determination that there was no deliberate indifference because "it cannot be said that appellees 'did virtually nothing' to investigate or monitor Clow's conduct after learning of the possibility that Clow had engaged in improper sexual behavior." (Appendix B at 12.) This is clearly a

misapplication of the deliberate indifference standard. In Canton v. Harris, where the issue was failure to provide adequate training in first aid, this Court noted that there had been some training by the city. Thus, this Court stated that "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." Canton, 489 U.S. at 390 and n. 11. See also Russo v. Cincinnati, 953 F.2d 1036 (6th Cir. 1992). The courts obviously need greater guidance on what the deliberate indifference standard entails. The courts here, like other courts, have concluded that if there is some supervision, then there can be no reckless or deliberate indifference.

This Court would respond to a crying need by clarifying the

deliberate indifference standard as it applies to inadequate supervision claims. What must a plaintiff show to establish that a defendant has been recklessly or deliberately indifferent? If a plaintiff shows that repeated constitutional violations occurred (not just a single incident, but as a course of conduct over a substantial period of time), which went undetected by supervisors, ought not the burden then shift to the defendant to show that reasonable and sufficient efforts were taken and that discovery of the abuse under the circumstances was impossible? The courts here, however, placed the burden solely on plaintiffs to show that respondents did nothing. This is wrong.

Petitioners believe that this Court should establish a standard that:

1. Supervisory officials in public schools have an affirmative duty to protect children from sexual abuse by teachers;

2. That this duty requires active measures to prevent abuse; to train for discovery of abuse; and to supervise adequately to uncover incidents of abuse; and

3. Where there has been sexual abuse of public school children over a period of time that has gone undetected, supervisory officials will be liable in the absence of evidence that reasonable and adequate measures were taken.

This objective standard would clearly place a duty on public school officials to protect children and to make sure that public school employees are properly monitored and supervised. If this Court permits the standard imposed by the courts here to stand, the result will be to sacrifice

our children to protect adults from liability.

CONCLUSION

Petitioners ask this Court to issue a Writ of Certiorari to review the judgments of the Ohio Courts, to state when is a public school district and its officials deemed to be deliberately indifferent to the sexual abuse of students by an employee.

Respectfully submitted,

Timothy M. Burke
(Counsel of Record)
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Andrew S. Lipton
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Petitioners

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APPENDIX A

THE SUPREME COURT OF OHIO
1993 TERM
To wit: February 10, 1993

Case No. 92-2372

Gregory McCullom et al.,

Appellants,

vs.

Jay H. Clow, Jr., et al.,

Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:
Motion Fee, $40.00, paid by Manley, Burke & Fischer.

(Court of Appeals No. C910442)

/s/ THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-910442

TRIAL NO. A-8803482

GREGORY McCULLOM,

and

ROBERT McCULLOM,
by his parent and natural
guardian Gregory McCullom,

and

ADOLPHUS McCULLOM,

and

JERRY L. and VICKIE L.
VERMILLION,

and

KIMBERLY JUNE VERMILLION, by
her parents and natural guar-
dians Jerry L. and Vickie L.
Vermillion,

and

LANA TURNER,

and

MONROE TURNER, by his parent and natural guardian Lana Turner,

and

JERMEL WILEY, by his parent and natural guardian Lana Turner,

and

ANNA GIVENS,

and

DONNEL TORAN GIVENS, by his parent and natural guardian Anna Givens,

and

LUCIAN and SHARON SMITH,

and

KEITH SMITH, by his parents and natural guardians Lucian and Sharon Smith,

and

GARY and CONNIE ZINSMEISTER,

and

SONYA ZINSMEISTER, by her parents and natural guardians Gary and Connie Zinsmeister,

and

MAXWELL ZINSMEISTER, by his parents and natural guardians Gary and Connie Zinsmeister,

and

MR. LOUIS H. and ARCHINELLA PATTON, JR.,

and

LOUIS H. PATTON, III, by his parents and natural guardians Louis and Archinella Patton,

and

CONSTANCE and RONALD KLINGELHOFFER,

and

KRISTEN KLINGELHOFFER, by her parents and natural guardians Constance and Ronald Klingelhoffer

Plaintiffs-Appellants,

vs.

JAY H. CLOW, JR.,

Defendant,

and

BOARD OF EDUCATION OF THE
PRINCETON CITY SCHOOL
DISTRICT,

and

RICHARD A. DENOYER,

and

DAVID D. BAKER,

and

BOBBY R. COX,

Defendants-Appellees.

Civil Appeal From: Hamilton County
Court of Common Pleas
Judgment Appealed From is: Affirmed
Date of Judgment Entry on Appeal:
September 30, 1992

Manley, Burke & Fischer, Timothy M. Burke, Esq., No. 0009189, Andrew S. Lipton, Esq., No. 0009191, and Carol S. Wood, Esq., No. 0040739, 225 West Court Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

McCaslin, Imbus & McCaslin and John J. Finnigan, Jr., Esq., No. 0018689, 1200 Gwynne Building, 602 Main Street, Cincinnati, Ohio 45202, and Rendigs, Fry, Kiely & Dennis, John W. Hust, Esq., No. 0027121, and Carolyn A. Taggart, Esq., No. 0027107, 900 Central Trust Tower, 5 West Fourth Street, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the briefs and the arguments of counsel.

This appeal stems from the trial court's granting of summary judgment in favor of four of the five defendants named in an action brought by various students and parents affiliated with the Princeton City School District ("District").

Defendant Jay Clow became employed as a teacher's aid for handicapped children at the District's Evendale Elementary School ("Evendale") in 1982. In the fall of 1983, Clow was elevated to the

position of a full-time teacher for the intermediate-level handicapped class at Evendale.

After the completion of an in-depth, year-long evaluation of Clow by his supervisors, Clow was informed in April 1988 that his teaching contract would not be renewed for the following school year. Several days later, Clow was arrested for having sexual contact with one of his former students, plaintiff-appellant Monroe Turner, and his employment with the District then terminated.

After Clow's arrest, a search of Clow's apartment uncovered thousands of photographs and hundreds of videotapes depicting nude young males, some of whom were engaged in sexual acts. School officials viewed the tapes and positively identified

several District students.[1/] Clow pleaded guilty to eleven counts of a twenty-four-count indictment containing charges of gross sexual imposition, attempted gross sexual imposition, illegal use of a minor and pandering sexually oriented material involving a minor.

The plaintiffs-appellants filed suit against Clow, the District, its superintendent, Richard Denoyer, Assistant Superintendent David Baker and Evendale's principal, Bobby Cox, asserting civil-rights violations under Section 1983, Title 42, U.S. Code ("Section 1983") and state-law claims of negligence, gross

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1/ At least one of the videotapes was identified as having been produced by Clow in the handicapped classroom at Evendale.

negligence, negligent infliction of emotional distress, respondeat superior and loss of services. After the completion of extensive discovery, the District filed for summary judgment, while the three District officials jointly filed a motion to dismiss, which was then converted into a summary-judgment motion by the trial court. The motions were granted, and the appellants timely filed the instant appeal,[2/] alleging in their single assignment of error that the trial court improvidently granted summary judgment to the appellees. We will first address appellants' contention that summary judgment was

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2/ Jay Clow is not a party to this appeal.

improper on the Section 1983 claims because appellees were recklessly indifferent to instances of known or suspected abuse of District students by Clow. We will then address appellants' argument that their state-law claims should have been resolved by a trier of fact because factual questions existed regarding the defense of sovereign immunity and the specific claims of respondeat superior and negligent infliction of emotional distress.

Section 1983 states in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory * * *, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction

> thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *.

To support an action under Section 1983, the plaintiff must establish that the conduct of persons, acting under color of state law, deprived the plaintiff of a federally protected right. See Roe v. Hamilton County Dept. of Human Serv. (1988), 53 Ohio App.3d 120, 560 N.E.2d 238.

As a local government entity, a board of education may be found liable under Section 1983 where an official custom or policy of the board causes an individual to suffer a constitutional deprivation. Monnell v. Dept. of Social Serv. (1978), 436 U.S. 658, 98 S.Ct. 2018. In Stoneking

v. Bradford Area School Dist. (C.A.3, 1990), 882 F.2d 720, certiorari denied (1990), 493 U.S. 1044, 110 S.Ct. 840, the court held that school children have a right not to be sexually assaulted by a public-school teacher. The court determined that the right recognized in Ingraham v Wright (1977), 430 U.S. 651, 97 S.Ct. 1401, "to be free from unjustified intrusions on personal security" clearly applied to school children sexually abused by teachers. The court further determined that "a teacher's sexual molestation of a student is an intrusion of the school child's bodily integrity, not substantially different for constitutional purposes from corporal punishment by teachers." 882 F.2d at 727.

In Jane Doe v. St. Louis (C.A.8, 1989), 901 F.2d 642, the Court held that in order for a school district and its officials to be liable under Section 1983 on the basis of a failure to adequately respond to known risks of physical and/or emotional harm presented by a district employee, a plaintiff must prove:

> (1) That the officials received notice of a pattern of continuing widespread, persistent unconstitutional misconduct by their subordinate(s);
>
> (2) Deliberate indifference to or tacit authorization of such conduct by the officials after notice to the officials of that misconduct; and
>
> (3) That the plaintiff was injured by acts pursuant to the District's custom of failing to investigate or act on complaints of violations of

> constitutional rights, i.e., that the custom was the moving force behind the constitutional violation.

In E.J. v. Hamilton County (S.D. Ohio 1939), 707 F.Supp. 314, the court recognized that Section 1983 liability may be imposed upon government agencies for a single abuse (as opposed to a pattern of widespread misconduct) that is so outrageous as to give rise to an inference that a supervisor must have breached his duty of proper supervision.

In the case sub judice, appellants contend that appellees received "many warnings" of Clow's improper conduct yet failed to respond to those warnings with proper investigation and/or supervision of Clow in deliberate indifference to the children's constitutional rights in

violation of Section 1983. The lower court concluded that the incidents which allegedly provided appellees with knowledge of Clow's aberrant behavior, when viewed either alone or in combination, did not put appellees on notice that Clow might sexually abuse children and were likewise insufficient, as a matter of law, to establish that the District's policy of investigating, hiring and supervising teachers, particularly Clow, was so wanting that it constituted deliberate indifference or reckless disregard for the constitutional rights of the children. After reviewing the voluminous record before us, we are compelled to agree with the trial court's reasoning and ultimate

decision regarding the Section 1983 claims.

The record reflects that the "Brian G." incident (as referred to in the briefs and by this court for confidentiality purposes) constitutes the only occasion prior to Clow's arrest and successful prosecution where the appellees received information that Clow may have sexually assaulted a child. According to the depositions of Evendale Police Chief Danny L. O'Malley and District Superintendent Denoyer, O'Malley phoned Denoyer in early 1987 and apprised him of a "rumor" he had just heard regarding Clow's possible "involvement" with a young boy several years earlier. Denoyer urged O'Malley to convince the child to "come

forward" with details so that the District could "get rid of" Clow. O'Malley told Denoyer that the child had not even been identified, that the officer who relayed the rumor to him had said that it may have been an "accident," and that the boy's family did not want to "make a big deal of it." According to Denoyer and Evendale's principal, Bobby Cox, Denoyer relayed the rumor to Cox and told him to watch for any "out of line" conduct by Clow. Denoyer also contacted two of the District's attorneys, who advised him that absent more information or a formal charge, "very little, if anything, could be done."

Approximately six months later, in the summer of 1987, while Denoyer

was "making rounds" at the District's schools, he noticed Clow at Evendale Elementary with a teenage boy, at a time when there was no reason for them to be there. Denoyer testified in his deposition that when he was told by a teacher present at the school that day that the young man with Clow was Clow's neighbor and a frequent visitor at Clow's home, he "thought to [himself] that it did not seem proper for an adult to have children around all the time," and that he then phoned O'Malley and requested that he arrange a meeting so that details of the rumor would surface. Shortly thereafter, the boy's mother, "Mrs. G.," his uncle, Sharonville Police Officer John Nuss, Evendale Police Officer Thomas Oaks, and Denoyer convened at

Denoyer's office.[3/] Mrs. G. informed the men that her son Brian had spent the night at Clow's house through the "Big Brother" program and awoke during the night to find Clow nearby, momentarily brushing his hand across the child's buttocks. According to Nuss and Denoyer, Mrs. G. was uncertain as to whether Clow was trying to make improper contact with Brian or merely tucking him into bed. Chief Nuss explained in his deposition that he accompanied Mrs. G. to the meeting not as a police officer but as a supportive brother-in-law, but stated that he advised his

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3/ The child involved in this incident, "Brian G," was not at the meeting and would not discuss the event with anyone but his family.

sister-in-law and the other participants at the meeting that the incident with Brian did not amount to a "prosecutable case" since it was unclear whether Clow's contact with the child was accidental.

Based upon these indisputed facts surrounding the Brian G. incident, appellants contend that "even armed with this specific report of illegal sexual contact by Clow, the District did virtually nothing." This statement misconstrues the record in several respects. First, the evidence fails to establish that any actual illegal sexual contact occurred between Brian and Clow; rather, as just discussed, it was unclear whether Clow's momentary brushing of Brian's buttocks was deliberate or accidental. Moreover, the record

reflects that after receiving the information from Mrs. G., the appellees employed affirmative steps to investigate and monitor Clow. Denoyer had O'Malley run a criminal background check on Clow, which yielded nothing. Denoyer also recontacted the District's attorneys and was again informed that there was no basis to fire or to take action against Clow. Denoyer was also advised that it was unnecessary to contact "241-KIDS"[4/] because two police departments were already apprised of and involved in the

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4/ R.C. 2151.421 requires that suspected cases of child abuse be reported to a local police agency or the Department of Human Services. In Hamilton County, "241-KIDS" serves as the number for reporting suspected abuses to the Department of Human Services.

situation. Baker, Cox, and Clow's immediate supervisor, Jackie Williams, were directed by Denoyer to watch for unusual behavior from Clow, and as a result, Cox increased the number of times he walked past Clow's classroom daily. Cox also relieved Clow's classroom assistant of all duties which might otherwise have taken her out of the classroom.

Thus, contrary to appellants' assertion, it cannot be said that appellees "did virtually nothing" to investigate or monitor Clow's conduct after learning of the possibility that Clow had engaged in improper sexual behavior.

Appellants cite other incidents which they essentially claim evince a custom or policy of appellees of ignoring, concealing or inadequately

responding to warnings of Clow's abusive conduct.

Appellants refer to a November 1984 letter written by appellee Assistant Superintendent Baker to appellant Vickie Vermillion, the mother of Kimberly Vermillion, a student in Clow's class, as a "red flag" indication of appellees' notice of Clow's sexual abuse of students. However, upon a reading of the explanation of the letter given by Baker in his deposition, it becomes clear that appellants' reliance upon the letter to support their claim is misplaced.

The letter contained the following paragraph:

> As I promised, Mr. Clow and I discussed the concerns you had

> mentioned. The three biggest concerns/comments about sexual abuse, fights with Kristen, and breadsticks were all discussed at great length. I sincerely believe that Mr. Clow had the best of intentions in those areas but now understand that his approach and methods for resolving these issues was not the best. [Emphasis ours.]

In his deposition, Baker stated that the term "sexual abuse" was used by the Vermillions in reference to a fight which occurred between their daughter and another class member. Specifically, Baker explained, "* * * 'sexual abuse' was the Vermillions term. They said that they felt [that] [Clow's] requiring two small girls to engage in a fight, a boxing match, I believe was the word they used, was the same as sexual abuse." (T.d. 166, at 34.)

Appellants also point to an incident involving Robert McCullom, who was also a student in Clow's class. Clow sent a letter to Robert's father regarding Robert's offensive body odor and, at some point, marked the band of Robert's underwear to determine whether Robert was continuously wearing the same pair of soiled underwear while his father was away on vacation. Robert's father contacted Principal Cox about the matter, and he, Cox and Clow met to discuss the incident. Cox apologized to Mr. McCullom for Clow's marking of the underwear and stated in his deposition that the school nurse should have handled the situation instead of Clow.

Appellants allege that while both Cox and Jackie Williams knew that

marking Robert's underwear was "absolutely inappropriate," they failed to report the incident to Denoyer after being told by Denoyer to "be aware" of Clow's conduct. While it can be said that Clow exercised poor judgment in addressing Robert's body-odor problem, appellants are unable to point to any evidence that indicates that Clow made improper sexual contact with Robert when marking his underwear. This incident and other events noted by appellants do tend to illustrate Clow's employment of some rather unusual methods in meeting the challenges of educating mentally deficient children. However, these incidents are insufficient, as a matter of law, to establish that appellees were deliberately indifferent to or tacitly

authorized any abusive behavior toward the children by Clow. Accordingly, the trial court did not err by granting summary judment to appellees on the Section 1983 claims.

Appellants next attack the trial court's award of summary judgment to appellees on the state-law negligence claims.

R.C. 2744.03(A)(5) contains a defense available to political subdivisions[5/] in negligence actions. This provision, in pertinent part, states that:

> [a] political subdivision is immune from liability if the injury * * * resulted from the

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5/ A school district is defined as a political subdivision pursuant to R.C. 2744.01(F).

> exercise of judgment or discretion in determining whether to acquire, or how to use * * * personnel, facilities and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

We conclude, as the trial court did, that the state-law claims advanced by appellants fall within the purview of "exercises of discretion or judgment in determining how to use personnel, facilities and other resources," within the meaning of R.C. 2744.03(A)(5). Moreover, contrary to appellants' assertion, none of the evidentiary material creates a genuine issue of fact as to whether appellees' actions were conducted with a malicious purpose, in bad faith, or in

a wanton or reckless manner. Thus, the trial court was correct in determining that appellees were immune from suit on the state-law claims and in granting summary judgment to appellees on those issues.[6/]

6/ While our finding of immunity encompasses appellants' respondeat-superior and negligent-infliction-of-emotional-distress claims, we nevertheless note that neither doctrine could have been successfully applied to the facts of the instant action. The District cannot be held liable under respondeat-superior principles for Clow's sexual assaults because the evidence did not establish that the District promoted or advocated Clow's behavior or that the District could have reasonably foreseen that Clow would assault the children. See Byrd v. Faber (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. Additionally, appellants do not fit within the scope of emotionally distressed bystanders within the meaning of Burris v. Grange Mut. Cas. (1989), 46 Ohio St.3d 84, 545 N.E.2d 83, and Paugh v. Hanks (1983), 6 Ohio St.3d 72, 451 N.E.2d 759.

Appellants' single assignment of error is overruled.

The judgment of the trial court is affirmed.

DOAN, P.J., KLUSMEIER and GORMAN, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8803482
J. Nurre

GREGORY McCULLOM, et al.

Plaintiffs

vs.

JAY H. CLOW, JR., et al.

Defendants

FINAL JUDGMENT ENTRY

Entered May 24, 1991

This matter came before the court on defendant Princeton Board of Education's Motion for Summary Judgment and upon individual defendants Richard Denoyer's, David

Baker's and Bobby Cox's Motion to Dismiss, which all parties agreed to treat as a summary judgment motion pursuant to Ohio Civil Rule 12(B). Defendants Denoyer, Baker and Cox filed a Motion to Strike, which was withdrawn prior to oral argument on the motions, as was the motions to dismiss on the grounds of the statute of limitations. This court, having considered the motions, memoranda in support, memoranda in opposition, the numerous affidavits filed in support and in opposition to the motions, the numerous depositions filed in support and in opposition to the various motions, and the oral arguments of counsel for plaintiffs and defendants orders as follows:

IT IS HEREBY ORDERED that defendant Princeton Board of

Education's Motion for Summary Judgment be granted, with the express determination that there is no just reason for delay pursuant to Ohio Civil Rule 54(B); and

IT IS FURTHER ORDERED that defendants Denoyer's, Baker's and Cox's Motion to Dismiss, treated as a motion for summary judgment, be granted, with the express determination that there is no just reason for delay pursuant to Ohio Civil Rule 54(B); and

IT IS FURTHER ORDERED that this court's decision, a true and accurate copy of which is attached hereto, is hereby incorporated into this final judgment entry; and

IT IS FURTHER ORDERED, that final judgment be entered in favor of defendants Richard A. Denoyer, David

Baker, Bobby R. Cox and the Princeton Board of Education, with an express determination that there is no just reason for delay, and that the action be dismissed as against these defendants with costs to be determined at the final outcome of this action.

IT IS SO ORDERED.

/s/ Judge Nurre

HAVE SEEN:

/s/ John W. Hust, Esq.
Rendigs, Fry, Kiely & Dennis
900 Central Trust Tower
5 West 4th Street
Cincinnati, OH 45202

/s/ Carolyn Taggart, Esq.
Rendigs, Fry, Kiely & Dennis
900 Central Trust Tower
5 West 4th Street
Cincinnati, OH 45202

/s/ W. John Sellins, Esq.
Droder & Miller Co., L.P.A.
125 West Central Parkway
Cincinnati, OH 45202

/s/ John J. Finnigan, Jr., Esq.
McCaslin, Imbus & McCaslin
1200 Gwynne Bldg.
602 Main Street
Cincinnati, OH 45202

/s/ Timothy M. Burke
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

/s/ Andrew S. Lipton
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

4321I/rrv

COUNTY OF HAMILTON
COURT OF COMMON PLEAS
Cincinnati, Ohio 45202

May 3, 1991

Thomas C. Nurre 632-8219
Judge

Timothy M. Burke, Esq.
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

John W. Hust, Esq.
Rendigs, Fry, Kiely & Dennis
900 Central Trust Tower
5 West 4th Street
Cincinnati, Ohio 45202

Carolyn A. Taggart, Esq.
Rendigs, Fry, Kiely & Dennis
900 Central Trust Tower
5 West 4th Street
Cincinnati, Ohio 45202

W. John Sellins, Esq.
Droder & Miller Co., L.P.A.
125 West Central Parkway
Cincinnati, Ohio 45202

John J. Finnigan, Jr., Esq.
McCaslin, Imbus & McCaslin
1200 Gwynne Building
602 Main Street
Cincinnati, Ohio 45202

Re: Gregory McCullom, et al., vs. Jay H. Clow, Jr., et al.
Case No. A8803482

Dear Counselors:

This matter comes before the Court on the motion to dismiss of defendants Richard A. Denoyer, David Baker, and Bobby R. Cox and defendant Princeton Board of Education's motion for summary judgment. Counsel are to be complimented for the professional, workmanlike and tireless efforts that have been advanced on behalf of their clients.

The Court has reviewed the pleadings, memoranda, affidavits, depositions, case law and arguments of

counsel. It should be stated at the outset that no one can help but deeply sympathize with the children, particularly the handicapped children, along with the parents and families of those children that were so ruthlessly violated and victimized by the actions of one Jay H. Clow, Jr. It goes without saying that sympathy cannot be a part of this Court's decision.

Defendants Denoyer, Baker and Cox motion to dismiss is submitted with affidavits of Denoyer. In its motion, on page 2, under Memorandum of Law, defendants incorporate by reference the arguments contained in defendant Board

of Education's motion for summary judgment. Rule 12(b) of the Rules of Civil Procedure state in part:

> "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleading as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

The parties have exhaustively presented all materials pertinent to

this motion as well as the motion for summary judgment, and the court will treat both motions as motions for summary judgment under Rule 56. In matter of fact, defendants in the concluding sentence of their reply memorandum request summary judgment of the Court on behalf of all parties (defendants).

The first matter to be considered by the Court is the plaintiffs' Civil Rights Action under 42 U.S.C. Section 1983. Plaintiffs contend that there is ample evidence that the School Board and its officials had knowledge that their inaction could lead to harm

to the plaintiff children. This Court holds that the incidents which plaintiffs knew about and/or investigated, alone or in combination, did not put Princeton or the individual defendants on notice that Clow might be a child abuser before his arrest and successful prosecution. The Brian G. incident is the only incident reviewed wherein Princeton received a report that Clow might have abused someone. In this instance, it is the Court's conclusion that the defendants acted reasonably in their investigation and supervision, albeit without 20/20 hindsight. The Court in so finding

feels that this view is consistent with the findings in Stoneking v. Bradford Area School District, 882 F.2d 720 (1989). The Court therefore finds as a matter of law that reasonable minds could come to but one conclusion - that the evidence is insufficient to establish that the defendants' policy of investigating, hiring and supervising teachers, and particularly Jay Clow, Jr., was so wanting that it constituted deliberate indifference or reckless disregard for the Constitutional rights of the plaintiffs.

Turning next to the claims of plaintiffs under state law, the Court finds defendants are entitled to summary judgment based on their immunity for negligent acts, including those occurring prior to November 20, 1985, the effective date of the Ohio Sovereign Immunity Statute. There is no evidence before the Court as to incidents pre-dating November 20, 1985, and if there were, immunity would apply under the authority of Enghauser Manufacturing Company v. Erickson Engineering Ltd., 6 Ohio St.3d, 31 (1983). In finding for the defendants, the Court specifically holds as a matter of law that the

provisions of Section 2744.03(A)(5) apply and defendants did not act with malicious purpose, in bad faith, or in wanton or reckless manner.

The Court further finds that defendant Princeton is not liable for Jay Clow's negligence in assaulting students in that the doctrine of respondeat superior applies only if he was acting within the scope of his employment. This Court holds that when an employee sexually assaults someone, this is outside the scope of his employment as a matter of law.

Additionally, the Court finds as a matter of law that these defendants violated no duty owed to plaintiffs individually, and even if they did the doctrine of sovereign immunity would apply.

The Court further finds that plaintiffs' parents' claims for negligent infliction of emotional distress fails to state a claim under the authority of Miller v. B & O S.W.R.R. Company, 79 Ohio St. 309 (1908) and Schultz v. Barberton Glass Company, 4 Ohio St.3d 131 (1983). Also, defendants Denoyer, Baker and Cox's motion to dismiss based on the

statute of limitations and insufficiency of process and service of process are not well taken and are therefore denied.

Counsel for plaintiffs in its Supplemental Memorandum in Opposition to Defendant Princeton Board of Education's Motion for Summary Judgment cites Anderson v. Ohio Department of Insurance, 58 Ohio St.3d 215 (1991). As stated above, the decisions of the public officials in the case sub judice were immune and therefore Anderson is factually inapposite (Sartori v. Columbus Board of Education, Case No. 90AP-845

(Franklin Co. App., 1991)). Princeton and its employees are immune from tort claims arising from decisions on how to use personnel unless the decision was made maliciously, in bad faith, wantonly or recklessly.

In addition, it is this Court's opinion that even if Sartori was not applicable, the decisions and implementation of those decisions in this case were so inexorably intertwined that the implementations were also immune (see Anderson at page 219).

Counsel for defendants is instructed to present an entry reflecting these decisions on Wednesday, May 22, 1991, at Noon, when the Court has taken the liberty of setting the matter for entry. Thank you for your considerate and considerable efforts on behalf of your clients and courtesies to the Court.

/s/ Thomas C. Nurre,
Judge

TCN/lgs

APPENDIX D

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1811

In The

Supreme Court of the United States

October Term, 1992

GREGORY McCULLOM, et al.,

Petitioners,

-vs-

BOARD OF EDUCATION OF THE PRINCETON CITY SCHOOL DISTRICT, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

JOHN J. FINNIGAN, JR.
Counsel of Record
McCASLIN, IMBUS & McCASLIN
1200 Gwynne Building
602 Main Street
Cincinnati, Ohio 45202
(513) 421-4646

JOHN W. HUST
CAROLYN A. TAGGART
RENDIGS, FRY, KIELY & DENNIS
900 Central Trust Tower
5 West Fourth Street
Cincinnati, Ohio 45202
(513) 381-9218

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether a public school district and school officials are liable under 42 U.S.C. § 1983 for a teacher's sexual abuse of students where the school officials received only one prior report that the teacher might have sexually abused a child and they responded by thoroughly investigating the report and greatly increasing their supervision over the teacher.

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STATEMENT OF THE CASE

The petitioners have misstated the facts throughout this case. The court of appeals noted this when it observed that the petitioners' argument below "misconstrues the record in several respects" (Petition for Writ of Certiorari at Appendix 20a). The petitioners continue to misstate the facts as they seek certiorari.

Respondents Princeton School District and school officials had notice of only one incident where teacher Jay Clow might have abused someone (Petition for Writ of Certiorari at Appendix 16a and 41a). This incident occurred in early 1987, when Evendale Police Chief Danny O'Malley told respondent School Superintendent Richard Denoyer of an anonymous tip that Clow might have fondled a child's buttocks one or two years earlier. The report was unclear whether Clow's momentary contact with the boy's buttock's was intentional or accidental (Petition for Writ of Certiorari at Appendix 19a-20a). Denoyer asked O'Malley to "find out who this person is and get them to come forward" so that Princeton "could get rid of (Clow)." O'Malley responded that the incident "was a little thing and it may have been an accident and they don't want to make a big deal out of it."

During the summer of 1987, Denoyer was reminded of O'Malley's report when he saw Clow go into a school building with a teen-age boy. Denoyer badgered O'Malley repeatedly to get details of the earlier anonymous report. O'Malley later learned that Brian G. was the boy involved in the report. Denoyer arranged to meet with Mrs. G. Sharonville Police Chief William Nuss, who was Mrs. G.'s brother-in-law, also attended the meeting.

Denoyer convened the meeting to gather information to take disciplinary action against Clow.

At the meeting, Mrs. G. said her son, Brian, who was not a Princeton student, had slept overnight at Clow's house through the Big Brother program. Mrs. G. said Clow had momentarily brushed his hand over the boy's pajamas covering his buttocks, apparently while tucking him in. Chief Nuss said that Clow's conduct was not criminal because it was unclear whether Clow had touched Brian G. accidentally or intentionally.

Petitioners' Statement of Facts is misleading because it does not mention several steps which respondents took to respond to this equivocal report. Respondents pursued the matter vigorously by the following actions:

(1) Denoyer tried to get Mrs. G. to press criminal charges against Clow and to allow her son to testify in a school disciplinary proceeding against Clow.

(2) Denoyer talked to John Hust, Princeton's attorney, to discuss how he should respond to the incident. They discussed whether Denoyer should report the incident to the County Department of Human Services and Hust advised him that he need not do so because the incident had already been reported to two police departments. Denoyer and Hust discussed the existing conditions which ensured that Clow would rarely, if ever, be alone with his students: (a) Anita Parks, a teacher's aide, was in the classroom with Clow virtually the entire time. She had worked as a social worker at University Hospital for ten years handling child abuse cases; (b)

another class joined with Clow's class daily, so the teacher and aide from the other class would also be present; (c) parents visited the class frequently, without prior notice to Clow; (d) Clow was scheduled for an in-depth evaluation, so his supervisor would be visiting the classroom often. Denoyer and Hust also discussed what steps Denoyer could take to monitor Clow more closely, which Denoyer did as set forth below.

(3) Denoyer consulted with Hust and Paul Berninger, Princeton's labor attorney, to find out whether he could fire Clow based on the available information, and they responded in the negative.

(4) Denoyer asked Mrs. G. to allow Jerry Lindahl, a Princeton school psychologist, to interview Brian to find out whether Clow had actually attempted to fondle him. Lindahl called Mrs. G. but Mrs. G. told him that she didn't feel there was any problem and that she didn't see any need for him to interview Brian.

(5) Denoyer asked Chief O'Malley to run a criminal background check on Clow, which proved negative.

(6) Denoyer described the incident to respondent Bobby Cox, the principal at Evendale Elementary School, and told him to watch Clow closely.

(7) Cox increased the number of times he observed Clow's classroom to seven or eight times per day.

(8) Cox relieved Anita Parks, Clow's aide, of all special duties which otherwise might have taken her out of the classroom.

(9) Cox regularly watched Clow leave the school grounds to make sure that Clow was not taking children home with him.

(10) Denoyer called Cox repeatedly (to the point that Cox "got annoyed with the number of calls") asking about the results of his observations of Clow.

(11) Denoyer told Jackie Williams, Clow's supervisor, that there had been an incident between Clow and a young boy. Williams told Denoyer that she was doing an in-depth evaluation of Clow that year. Denoyer told her to watch for any unusual behavior in the classroom and report it to him. She observed Clow frequently throughout the year. Denoyer followed up by asking her whether she had observed anything unusual, but she had not. He also told her to tell Clow not to take the students anywhere in his car, which she did.

(12) Denoyer asked Joanne Olman, the school psychologist, whether she was involved in any sexual abuse cases in the multi-handicapped classes. She responded that she was not. He told her to watch out for any unusual behavior in the multi-handicapped classes.

(13) Respondent David Baker, the assistant superintendent, talked to Cox and Williams more frequently to ask them whether anything unusual was occurring in Clow's classroom.

Petitioners' description of the abuses allegedly perpetrated by Clow is misleading too. Petitioners state that Clow pleaded guilty to "multiple counts of sexual misconduct" (Petition for Writ of Certiorari at 7). However, only one count involved contact with a Princeton student on school grounds. This single count involved Clow surreptitiously videotaping petitioner Max Zinsmeister, unbeknownst to Max or school officials, while Max changed his pants after falling in the mud.

Petitioners' statement that "respondents' own expert has confirmed much of this abuse" (Petition for Writ of Certiorari at 8) is a misstatement. In fact, respondents' expert confirmed very few of the incidents alleged by petitioners.

Petitioners have never attempted to delineate which of the claimed abuses occurred before or after respondents received notice of Clow's alleged abuse of Brian G. in the summer of 1987. Many of the alleged incidents occurred, if at all, prior to that date. Respondents cannot be held liable for incidents which occurred prior to when they received notice that Clow had allegedly abused Brian G.

Finally, petitioners suggest that respondents would have discovered Clow's alleged abuses if they had reported the Brian G. incident to the County Department of Human Services (Petition for Writ of Certiorari at 11-12). This is a misstatement. The Department of Human Services would not have informed respondents of any prior incident involving Clow, for confidentiality reasons. It would not have led to criminal charges against Clow because the police had already concluded that the Brian G. incident was not prosecutable.

ARGUMENT

I. WHETHER A PUBLIC SCHOOL DISTRICT AND SCHOOL OFFICIALS ARE LIABLE UNDER 42 U.S.C. § 1983 FOR A TEACHER'S SEXUAL ABUSE OF STUDENTS WHERE THE SCHOOL OFFICIALS RECEIVED ONLY ONE PRIOR REPORT THAT THE TEACHER MIGHT HAVE SEXUALLY ABUSED A CHILD AND THEY RESPONDED BY THOROUGHLY INVESTIGATING THE REPORT AND GREATLY INCREASING THEIR SUPERVISION OVER THE TEACHER.

Petitioners urge the Court to grant certiorari and hold that "supervising officials in public schools have an affirmative duty to protect children from sexual abuse by teachers" (Petition for Writ of Certiorari at 28). This is in direct conflict with the Court's holding in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Court noted in *DeShaney* that the Due Process Clause limits the State's power to act, but does *not* function "as a guarantee of certain minimum levels of safety and security," and "cannot fairly be extended to impose an affirmative obligation on the State to ensure that (an individual's life, liberty or property) interests do not come to harm through other means." *Id.* at 195.

A school district and its officials are liable under 42 U.S.C. § 1983 for a teacher's sexual abuse of his students only if the abuse occurred because the school officials supervised the teacher so inadequately as to constitute deliberate indifference toward the students' constitutional rights. *Black v. Indiana Area School Dist.*, 985 F.2d 707 (3d Cir. 1993); *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied sub nom. Caplinger*

v. Doe, ___ U.S. ___, 113 S. Ct. 1066, *reh'g denied*, 113 S. Ct. 1436 (1993), *reh'g granted en banc, Doe v. Taylor Independent School Dist.*, 987 F.2d 231 (5th Cir. 1993); *Jane Doe "A" v. Special School Dist. of St. Louis County*, 901 F.2d 642 (8th Cir. 1990); *D.T. v. Independent School Dist. No. 16*, 894 F.2d 1176 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied sub nom. Smith v. Stoneking*, 493 U.S. 1044 (1990); *Spann v. Tyler Independent School Dist.*, 876 F.2d 437 (5th Cir. 1989), *cert. denied sub nom. Spann v. Jones*, 493 U.S. 1047 (1990); *Thelma D. v. St. Louis Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *Gates v. Unified School Dist. No. 449*, 1992 U.S. Dist. LEXIS 8485 (D. Kan. 1992).

These cases hold that students have a constitutional right to be free from a teacher's sexual abuse. Under these cases, school officials are deemed deliberately indifferent to students' constitutional rights if the school officials received notice of a pattern of sexual misconduct by their teachers and then deliberately fail to supervise the teachers, thus proximately causing a teacher to sexually abuse another student. The lower courts have applied this deliberate indifference standard in the foregoing sexual abuse cases decided under 42 U.S.C. § 1983, as well as thousands of other cases decided under the statute involving claimed violations of other types of constitutional rights. This Court has applied the deliberate indifference standard in cases arising under 42 U.S.C. § 1983 for nearly 20 years. *Estelle v. Gamble*, 429 U.S. 97 (1976). Petitioners therefore unfairly misstate the law by claiming there is a "crying need" for this Court to clarify this standard (Petition for Writ of Certiorari at 26).

In the case *sub judice,* respondents had notice of only one incident where Clow might have sexually abused a child. This was the Brian G. incident. The report was very equivocal as to whether Clow's momentary touching of Brian G. was an act of sexual abuse or an accident. Respondents reacted to this incident by thoroughly investigating the report and greatly increasing their supervision over Clow. Respondents acted with diligence, not deliberate indifference.

Petitioners misstate the court of appeals' ruling in this action. Petitioners argue that the court of appeals incorrectly applied the deliberate indifference standard by holding that respondents satisfied this standard because "it cannot be said that appellees 'did virtually nothing' to investigate or monitor Clow's conduct after learning of the possibility that Clow had engaged in improper sexual behavior" (Petition for Writ of Certiorari at 25). This is a misstatement because the petitioners had argued that respondents "did virtually nothing" in response to the Brian G. incident, and the court of appeals was merely rejecting that argument. In fact, the court of appeals correctly outlined and applied the deliberate indifference test in its opinion contained at Appendix 14a-15a of the Petition for Writ of Certiorari.

Petitioners urge the Court to adopt a legal standard which charges school officials with "an affirmative duty to protect children from sexual abuse by teachers" (Petition for Writ of Certiorari at 28). Petitioners urge the Court to hold that "this duty requires active measures to prevent abuse; to train for discovery of abuse; and to supervise adequately to uncover incidents of abuse" (Petition for Writ of Certiorari at 28).

This Court has held that 42 U.S.C. § 1983 requires a political subdivision to provide a minimal level of safety for a person only if the political subdivision has deprived the person of his liberty in situations involving convicted felons, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); persons under arrest, *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-245 (1983); persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982); or pre-trial detainees, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979). A student does not surrender his liberty rights when he enters the school door and this Court has so held for the past 70 years. *Bartels v. Iowa*, 262 U.S. 404 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

It is ludicrous for petitioners to argue that a student's liberty interest is impaired to the same extent as a convicted felon's or a person in any of the other categories cited above. In fact, the petitioners propose an expansion of the Due Process Clause which is just as unwarranted and unprecedented as in *Collins v. Harker Heights*, ___ U.S. ___, 112 S. Ct. 1061 (1992), where the Court rejected the petitioner's claim that a city owed a federal constitutional duty to provide its employer with minimal levels of safety.

In effect, the standard which petitioners urge the Court to adopt would impose vicarious liability on a public entity for the constitutional torts of its employees. However, this Court has long held that liability cannot be imposed on a public entity under 42 U.S.C. § 1983 based on a *respondeat superior* theory. *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978).

Certiorari is not appropriate in this case under Sup. Ct. R. 10.1(c) because the Court has already addressed the deliberate indifference standard in the content of § 1983 claims for failure to train or supervise. *Canton v. Harris*, 489 U.S. 378 (1989). The case *sub judice* is consistent with that decision as well as the lower court cases cited at page 7 of this brief, where courts have applied the deliberate indifference standard in § 1983 cases involving a teacher's sexual abuse against a student.

Petitioners' real aim can be discerned from a cursory reading of their Petition. Petitioners complain that: (1) the court of appeals failed to correctly apply the deliberate indifference standard to the evidence *sub judice* (Petition for Writ of Certiorari at 17); (2) the evidence of respondents' notice of Clow's misconduct was "inexplicitly (sic) characterized as 'undisputed facts' in spite of the substantially conflicting testimony" (Petition for Writ of Certiorari at 18); (3) the lower courts "ignored" certain testimony from Clow's aide (Petition for Writ of Certiorari at 24). Quite clearly, petitioners seek certiorari to ask this Court to re-weigh the evidence already considered by the trial court, the court of appeals and the state supreme court. This is an improper reason to grant certiorari and is an inappropriate use of this Court's scarce judicial resources.

CONCLUSION

For all the reasons set forth in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. FINNIGAN, JR.
Counsel of Record
McCASLIN, IMBUS & McCASLIN
1200 Gwynne Building
602 Main Street
Cincinnati, Ohio 45202
(513) 421-4646

JOHN W. HUST
CAROLYN A. TAGGART
RENDIGS, FRY, KIELY & DENNIS
900 Central Trust Tower
5 West Fourth Street
Cincinnati, Ohio 45202
(513) 381-9218

Attorneys for Respondents